OCBC BANK (MALAYSIA) BHD

v.

STAR EDGE SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[ORIGINATING SUMMONS NO: 24-112-2000-I]
31 OCTOBER 2002

CIVIL PROCEDURE: *Action - Consolidation of actions - Foreclosure proceedings - Whether can be converted into a writ action and be consolidated with a civil suit - Whether contrary to principles of statutory right of chargee - Whether against right of creditor to sue on breach of agreement - Distinction between action ad rem and action in personam - Whether court can order such actions to be consolidated - Whether defendant's application bona fide - Rules of the High Court 1980, O. 4 r. 1 & O. 28 r. 8(1)*

The plaintiff had granted an overdraft facility to the defendant and as a result of the defendant's failure to regularise the said facility, the plaintiff recalled the said facility and demanded payments, which were not honoured by the defendant herein as borrower and the other guarantors. Hence, the plaintiff instituted the foreclosure proceedings for an order under s. 148(2)(c) of the Sarawak Land Code (Cap 81) ('SLC') pursuant to the said memorandum of charge given by the defendant as security of the said facility. The plaintiff also instituted a civil suit against the defendant herein together with the three guarantors. The defendant thereby sought an order under O. 28 r. 8(1) of the Rules of the High Court 1980 ('RHC') that the foreclosure proceedings herein, commenced by way of originating summons be turned into a writ and an order under O. 4 r. 1 RHC to consolidate the said foreclosure proceedings with the said suit to be carried on as one action. The plaintiff opposed by submitting the defendant's application herein was not *bona fide*, frivolous and was intended to deny the plaintiff from exercising its statutory rights.

Held:

[1] To order the said foreclosure proceedings to be converted into a writ action and to be consolidated with the said suit would be contrary to the principles of a statutory right of a chargee, being a right *ad rem*, against the right of a creditor to sue on a breach of agreement, being a right *in personam.* (p 201 e)

[2] The defendant was unable to produce any single authority to support its application to convert an originating summons (the foreclosure proceedings) being an action *ad rem* into a writ action and to consolidate the said foreclosure proceedings with the suit. (p 203 h)

[3] To allow such an application to succeed would open up the floodgates to borrowers to delay the rights of banks/chargees to a speedy recovery (by way of foreclosure proceedings) of the loans granted. It would greatly affect business efficacy which would inevitably lead to the reluctance of financial institutions to lend money to *bona fide* entrepreneurs. (p 204 a)

[Defendant's application dismissed with costs.]

Case(s) referred to:

Kuching Plaza Sdn Bhd v. Bank Bumiputra Malaysia Bhd and Another Appeal [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223 SC ***(dist)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Shell Malaysia Trading Sdn Bhd v. Perusahaan Banyu Emas Sdn Bhd [1998] 4 CLJ 66 HC ***(refd)***

Legislation referred to:

Land Code (Cap 81) (Sarawak), s. 148(1), (2)(c)
National Land Code, s. 256
Rules of the High Court 1980, O. 4 r. 1, O. 28 r. 8(1)

For the plaintiff - Lam Ko Lun; M/s David Allan Sagah Teng
For the defendants - Gabriel Wong; M/s Detta Samen & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Zakaria Sam JC:

Background

On 19 April 2000 the plaintiff instituted the foreclosure, proceedings for an order under s. 148(2)(c) of the Sarawak Land Code (Cap 81) ('SLC') pursuant to the Memorandum of Charge Instrument No. L5689/1997 (the said charge) registered at the Kuching Land Registry Office, against the defendant.

On 24 May 2000 the plaintiff instituted a Civil Suit No. 22-55-2000-I (the said suit) against the defendant herein together with three other defendants in pursuant to the overdraft facility granted by the plaintiff to the defendant as evidenced by the facility letters and the facility agreement. The plaintiff's action against the other three defendants in the said suit is pursuant to the letter of guarantee (the said guarantee) executed by the said defendants in favour of the plaintiff in consideration of the plaintiff granting of the aforesaid overdraft facilities to the defendant.

The Application

On 4 May 2001, the defendant filed this application for:

(i) An order under O. 28 r. 8(1) of the Rules of the High Court 1980 (RHC) that the foreclosure proceedings herein, commenced by way of originating summons be turned into a writ; and

(ii) An order under O. 4 r. 1 RHC – to consolidate the said foreclosure proceedings with the said suit and thence be carried on as one action in the said suit

The grounds of the defendant's application are briefly as follows:

(i) the defendant had not committed any default or breach under the said charge upon which the plaintiff is entitled to issue the statutory notice and/or that the plaintiff is entitled to an order for sale.

(ii) the issue of whether or not there is default or breach under the facility agreement/the said charge in the said suit is central and crucial to the outcome of this foreclosure proceedings, and such issue in the said suit is similar to the issues in the foreclosure proceedings;

(iii) this court ought not to adjudicate the foreclosure proceedings without firstly making an adjudication after the trial of the suit;

(iv) common questions of facts arose in both the foreclosure proceedings and the said suit; and

(v) the rights to relief claimed in both actions arose from the same factual matrix.

The plaintiff in opposing the defendant's application, submitted that:

(i) the present case is not one where O. 28 r. 8(1) and O. 4 r. 1 RHC ought to apply;

(ii) on the facts and law, an order for consolidation is not appropriate in the present case and in fact, if ordered, will only go against the whole purpose behind the existence of such right to consolidate, ie, to save time and costs;

(iii) the defendant's application herein is not *bona fide*, frivolous and intended to deny the plaintiff from exercising their statutory rights to an order for sale pursuant to the said charge executed in favour of the plaintiff. It is further made for the sole purpose of delaying the whole proceedings; and

(iv) the defendant's frivolous attempt to delay the matter herein by seeking to consolidate the foreclosure proceedings and the said suit is contrary to the contractual as well as common law rights attributed to the plaintiff chargee to pursue all remedies concurrently.

In this context and for ease of reference O. 28 r. 8(1) and O. 4 r. 1(1) RHC is reproduced below, which reads:

O. 28 r. 8(1)

> Where in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

O. 4 r. 1(1)

Where two or more causes or matters are pending, then, if it appears to the Court:

(a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

Findings

For the foreclosure proceedings the plaintiff states the following facts. The plaintiff's claim herein is the same as any other banking claims for recovery of debts by way of a civil action as well as foreclosure proceedings. The plaintiff had granted an overdraft facility to the defendant (being the 1st defendant in the said suit), as documented in the facility agreement. As security for the said overdraft facility, the defendant (being the 1st defendant in the said suit) had executed a memorandum of charge in favour of the plaintiff. The 2nd to the 4th defendants in the said suit had also executed a guarantee in favour of the plaintiff in consideration of the said overdraft facility. At all material times, statements of account for the said overdraft facility have been furnished to the defendant but no dispute whatsoever was raised against the said statements. The defendants had in breach of the said facility agreement exceeded the maximum aggregate principal amount of the said overdraft facility of RM4.2 million. The plaintiff had reminded the defendant to regularise the said overdraft facility account but the defendant had failed to do so. As a result thereto, the plaintiff was compelled to and had recalled the said overdraft facility. Demand for payments was not honoured by the defendant as the borrower and the other three defendants as guarantors (exh. NT5). The plaintiff had thereafter issued the statutory notice under s. 148(1) SLC before instituting the foreclosure proceedings.

Based on the aforesaid, it is clear that the plaintiff has complied with all the pre-requisite of s. 148(1) SLC and therefore is *prima facie* entitled to issue the statutory notice and followed by the foreclosure proceedings.

Although the relief claimed under the foreclosure proceedings and the said suit arose out of the same transaction and involved the application of common set of facts, as it would be for all banking claims as they relate to one particular facility, in law and in principle, the foreclosure proceedings and the said suit are entirely distinct.

In this respect, the distinction must be drawn that a proceeding undertaken pursuant to the said charge, as in the present foreclosure proceedings, is an action *ad rem*, whereas action taken pursuant to the said facility agreement (and the said guarantee), as in the said suit, is an action *in personam*. Different principles of law apply in each case.

It is trite law that a creditor is entitled to proceed with foreclosure proceedings and a civil suit, simultaneously. More importantly, such right of the plaintiff/chargee to pursue simultaneous remedies has been expressly agreed upon by the defendant as per cl. 10.29 of the annexure to the said memorandum of charge under the heading of 'Simultaneous Remedies', cl. 14(4) and cl. 29 of the facility agreement under the headings of 'Concurrent Remedies' and 'Concurrent Proceedings', respectively.

I agree with the submission of the learned counsel for the plaintiff that to order the said foreclosure proceedings to be converted into a writ action and to be consolidated with the said suit would be contrary to the principles of a statutory right of a chargee, being a right *ad rem*, against the right of a creditor to sue on a breach of an agreement, being a right *in personam*.

Although O. 4 r. 1 RHC sets out the requirements to be achieved before two or more causes or matters may be consolidated, it is by no means mandatory for the court to order consolidation just because the applicant is able to "squeeze" their position into the provisions. By the very fact that the provision states that in those circumstances, the court may order consolidation, it is obvious that whether or not consolidation ought to be ordered is a matter of discretion of the presiding judge in this connection. A judge ought to consider, in particular, the purpose behind the provision for consolidation, ie, to save time and costs, in determining whether or not to exercise its discretion to order consolidation. In the event that the court is of the view that there is no issue of costs and time savings, but in fact the application to consolidate was made for some other reasons, the causes or matters ought not to be consolidated.

The learned counsel for the defendant submitted that factual matrix *per se* in both a charge action and a suit for recovery of debt, does not entitle any party as of right, for consolidation. He also submitted that O. 4 r. 1 RHC ensures that there can be no danger of floodgates being opened because the exercise of a discretion for leave to consolidate, must be an exercise based on established principles and sufficient considerations as follows:

(a) that the factual allegations and issues of fact or law raised in both charge action and the suit must not only be common but are relevant;

(b) that such common and relevant issues of fact or law bear sufficient importance in proportion to the rest of the subject matter of the actions.

By his very own submission, learned counsel for the defendant agrees that it is an exercise of the discretion of the presiding judge in an application under O. 4 r. 1 RHC as to whether or not there ought to be an order for consolidation.

I have considered all the factual allegations by both parties as well as the issues of law raised in the present proceedings and I have come to the conclusion that they do not warrant an exercise of my discretion in favour of granting an order for consolidation.

It was held in *Shell Malaysia Trading Sdn Bhd v. Perusahaan Banyu Emas Sdn Bhd* [1998] 4 CLJ 66 that:

(i) An order for sale is an *'ad rem'* remedy and these proceedings could not be the forum for ventilating any contractual dispute allegedly existing between the parties. The issue here was whether or not the order for sale ought to be granted.

(ii) An allegation that a chargee acted in breach of contract, while it may give rise to an independent action *in personam*, is insufficient *per se* to defeat the *ad rem* rights of a chargee under a registered charge to an order for sale. Therefore, the dispute as to the rate of interest would not suffice as a cause to the contrary, as it related to an allegation of breach of contract and thus would give rise if necessary to an action *in personam*.

(iii) As an alleged dispute as to the rate of interest cannot amount to a cause to the contrary to prevent an order for sale from issuing, there was no reason why these proceedings have to be stayed pending a resolution of the alleged dispute.

In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, it was clearly decided by the Federal Court that it is not for the judge hearing an application by a chargee bank for an order for sale, to decide on the various disputed issues of facts, as that remains to be determined in another action brought to pursue a right *in personam*. The duty of the judge hearing an application for an order for sale is only to be satisfied that the chargee bank had complied with the requirements set out in the Land Code, namely in the instant case, the plaintiff has satisfied s. 148 SLC.

Although the aforesaid authorities are decisions on s. 256 of the National Land Code, which provides that, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary, the principle enunciated therein are likewise applicable to an application for an order for sale of land pursuant to a charge registered under Sarawak Land Code.

In his argument, the learned counsel for the defendant sought to rely on the case of *Kuching Plaza Sdn Bhd v. Bank Bumiputra Malaysia Bhd and Another Appeal* [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223, where the Supreme Court refused to grant the order for sale. With due respect, that case has no relevance here as it deals specifically with s. 148 SLC, whilst the application before this court is an application under O. 28 r. 8(1) and O. 4 r. 1 RHC. Furthermore, the facts of the said case are distinguishable from the instant case. I agree with the submission by the learned counsel for the plaintiff that in *Kuching Plaza*'s case, the evidence adduced clearly showed that the respondent being the chargee had recognized the rights of the 2nd and 5th defendants as purchasers of the shop lots and equitable owners of the shop lots and had in fact collected redemption sums from the purchasers to satisfy the charge. Surely in such a case, the court would not allow the chargee to enforce the security on the charge over the rights of the said purchasers.

I also observed that the defendant is unable to produce any single authority to support its application to convert an originating summons (the foreclosure proceedings) being an action *ad rem* into a writ action and to consolidate the said foreclosure proceedings with the said suit.

I would also say that to allow such an application to succeed would open up the floodgates to borrowers to delay the rights of banks/chargees to a speedy recovery (by way of foreclosure proceedings) of the loans granted. It would greatly affect business efficacy which would inevitably lead to the reluctance of financial institutions to lend money to *bona fide* entrepreneurs.

Conclusion

It is clear that the defendant's application herein is not *bona fide*, frivolous and to delay the whole proceedings.

On the above premises, the defendant's application is dismissed with costs.